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10 Exel Direct Inc.; DPWN Holdings (USA), Inc., improperly named and served as DHL Express
11 (USA), Inc.; and Deutsche Post Beteiligungen Holding GmbH, improperly named as Deutsche
12 Post DHL
13

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 CV 12 4137

17 CASE NO. _____

18 Plaintiffs,

19) CLASS ACTION
20) NOTICE OF REMOVAL
21)

22) EXEL DIRECT INC., DEUTSCHE POST DHL,
23) DHL EXPRESS (USA), INC., and
24) DOES 1 to 50,

25) Defendants.

26 PLEASE TAKE NOTICE that Defendants, Exel Direct, Inc. ("Exel"), Deutsche Post
27 DHL ("Deutsche Post"), DHL Express (USA), Inc. ("DHL"), hereby removes this case from the
28 Superior Court of Alameda County, California, to the U.S. District Court for the Northern
District of California. In support of this removal, Defendants state as follows:

1. **The Action.** Plaintiff, Daniel Villalpando, filed his Class Action Complaint
captioned *Daniel Villalpando, individually and on behalf of others similarly situated v. Exel
Direct Inc., Deutsche Post DHL, DHL Express (USA), Inc., and Does 1 through 50, inclusive*,
Case No. RG12634666 (the "Class Action Complaint"), in the Superior Court of Alameda
County, California, on June 14, 2012. The *Class Action Complaint* asserts causes of action for

1 (1) failure to pay minimum wage & liquidated damages (Labor Code §§ 1182.11, 1182.12, 1194,
 2 1197, and 1197.1; IWC Wage Order No. 9; and Minimum Wage Order); (2) failure to pay
 3 overtime (Labor Code §§ 510 and 1194 *et seq.*, and IWC Wage Order No. 9); (3) failure to
 4 provide off-duty meal periods (Labor Code §§ 226.7 and 512; and Cal. Code Regs., Title 8
 5 § 11090 sections 7 and 11); (4) failure to provide off-duty rest periods (Labor Code §§ 226.7 and
 6 C.C.R., Title 8 § 11090 section 12); (5) unlawful deductions from wages (Labor Code §§ 221,
 7 223, and 400-410; IWC Wage Order No. 9; and Title 8 C.C.R. § 11090 section 8); (6) cost of
 8 physical examinations (Labor Code § 222.5); (7) coerced purchases (Labor Code § 450 *et seq.*);
 9 (8) reimbursement of business expenses (Labor Code § 2802); (9) failure to keep accurate
 10 payroll records (Labor Code §§ 1174 & 1174.5); (10) failure to furnish accurate wage
 11 statements (Labor Code § 226); (11) waiting time penalties (Labor Code §§ 201-203); (12)
 12 willful misclassification of individual as independent contractor (Labor Code § 226.8); and (13)
 13 unfair competition (Bus. & Prof. Code §§ 17200, *et seq.*) Copies of all of the pleadings and
 14 papers filed in the Superior Court of Alameda County, California, of which Defendants are
 15 aware, are attached as *Exhibit A*.

16 **2. Statutory Grounds for Removal.** This action is removable under 28 U.S.C.
 17 § 1441(a) and 28 U.S.C. § 1453. 28 U.S.C. § 1441(a) provides for the removal of state court
 18 civil actions over which U.S. District Courts have original jurisdiction. As is explained in
 19 greater detail below, this Court has original jurisdiction over this case under 28 U.S.C. §
 20 1332(d)(2)(A) because this is a class action in which the proposed class includes at least 100
 21 members, the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and at
 22 least one putative class member is a citizen of a state different from one of the defendants. As
 23 such, this action is removable pursuant to 28 U.S.C. § 1453, which provides that a class action
 24 may be removed to federal court in accordance with 28 U.S.C. § 1446.

25 The Court also has original jurisdiction over this case under 28 U.S.C. § 1332(d)(2)(C)
 26 because this is a class action in which the proposed class includes at least 100 members, the
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1 amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and at least one
 2 putative class member is a United States citizen, while at least one defendant is a citizen of a
 3 foreign nation.

4 **3. Citizenship of the Parties.** Plaintiff Villalpando alleges he is a resident of
 5 Contra Costa County, California. *Class Action Complaint*, ¶ 10. He is therefore a citizen of
 6 California.

7 Defendant Exel is a California corporation with its principal place of business in Ohio
 8 and is therefore a citizen of both California and Ohio. *See id.* at ¶ 12; *Hertz Corp. v. Friend*, 130
 9 S.Ct. 1181, 1192 (2010) (“We conclude that “principal place of business” is best read as
 10 referring to the place where a corporation’s officers direct, control, and coordinate the
 11 corporation’s activities. It is the place that Courts of Appeals have called the corporation’s “nerve
 12 center.” And in practice it should normally be the place where the corporation maintains its
 13 headquarters—provided that the headquarters is the actual center of direction, control, and
 14 coordination”). Co-defendant Deutsche Post¹ is a German corporation with its principal place of
 15 business in Germany and is therefore a citizen of Germany. Co-defendant DHL is an Ohio
 16 corporation with its principal place of business in Florida and is therefore a citizen of both Ohio
 17 and Florida.

18 Plaintiff’s naming of unidentified “Doe” defendants is irrelevant to removability. *See id.* at 28
 19 U.S.C. § 1441(a) (“For purposes of removal under this chapter, the citizenship of defendants
 20 sued under fictitious names shall be disregarded.”); *Kruso v. Int’l Tel. & Telegraph Corp.*, 872
 21 F.2d 1416, 1424 (9th Cir. 1989) (the naming of Doe defendants cannot defeat diversity
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24 ¹ Plaintiff wrongly identifies Deutsche Post as the entity owning Exel. *Class Action Complaint*,
 25 ¶ 12 (“Exel Direct is a wholly-owned entity of Deutsche Post DHL”). Exel is owned by DPWN
 26 Holdings (USA), Inc., an Ohio corporation with its principal place of business in Ohio. DPWN
 27 Holdings (USA), Inc. is wholly-owned by Deutsche Post Beteiligungen Holding GmbH, a
 28 German corporation with its principal place of business in Germany. This mistake does not
 affect the citizenship analysis.

1 jurisdiction). Thus, the diversity requirements of both 28 U.S.C. §§ 1332(d)(2)(A) and
 2 1332(d)(2)(C) are satisfied.

3 **4. The Aggregate Number of Proposed Class – 28 U.S.C. 1332(d)(5)(B).** Plaintiff
 4 defines the proposed class to consist of

5 All current and former Drivers who were required to sign the
 6 “Independent Truckman’s Agreement” and provided delivery services for
 7 Exel Direct in the State of California during the period of June 2008
 through the present.

8 *Class Action Complaint*, ¶ 70. It is not clear if Plaintiff intends to include only California
 9 residents or all independent contractors that work or otherwise perform services in California in
 10 the class definition. For instance, at any given time Exel utilizes the transportation services of a
 11 substantial number of independent contractor drivers across the country. Some indeterminate
 12 number of these independent contractors have delivered loads from or to California during the
 13 proposed class period. Only a portion of these independent contractors are offered work by
 14 Exel’s California offices. It is unclear whether Plaintiff claims that no California law causes of
 15 action apply extraterritorially to California residents outside of California or to non-California
 16 residents who happen to be performing work in California.

17 In any case, regardless of how Plaintiff’s insufficient definition is interpreted, the
 18 proposed class contains more than 100 members. Based on a review of its financial records,
 19 Exel has determined that the aggregate number of independent contractors who are residents of
 20 California and have been offered work by its California offices (“California-Based Independent
 21 Contractors”) is at least 347, which is more than the 100 members or greater required by 28
 22 U.S.C. § 1332(d)(5)(B). *Declaration of Renee Albarano* (“Albarano Decl.”), ¶ 2, attached
 23 hereto as *Exhibit B*.

24 **5. Amount in Controversy – 28 U.S.C. §§ 1332(a) and (d)(2).** Although
 25 Defendants deny all of Plaintiff’s material allegations, the amount in controversy exceeds the
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1 \$5,000,000 jurisdictional threshold under CAFA by virtue of the *Class Action Complaint's*
 2 allegations in the Third, Fourth, Eighth, and Twelfth Causes of Action alone.

3 i. *Reimbursement of Business Expenses (Cal. Lab. Code § 2802)*. Plaintiff claims
 4 he "and the Class members incurred necessary expenditures and losses in direct consequence of
 5 the discharge of their" work including "truck rentals/leases, towing, gasoline, tires, maintenance,
 6 repairs, car washes, and insurance" costs and requests that the Court award "plaintiff and the
 7 Class restitution for" all business expenses. *Class Action Complaint*, ¶¶ 107-108(a); Prayer for
 8 Relief, ¶ P. A review of Exel's settlement statement records shows that in 2011 and 2012,
 9 respectively, \$2,203,650 and \$942,232 were deducted from California-Based Independent
 10 Contractor settlements for the kind of items for which Plaintiff seeks reimbursement. *Albarano*
 11 *Decl.*, ¶ 3. Accordingly, the amount in controversy for the Cal. Lab. Code § 2802 claim based on
 12 2011 and 2012 data alone is **\$3,145,882**, a number that would only increase when settlement
 13 deduction information for 2008, 2009, and 2010 are considered.

14 ii. *Willful Misclassification of Individual as Independent Contractor (Cal. Lab.*
 15 *Code § 226.8)*. Plaintiff alleges Defendants have "engaged in or is engaging in a pattern or
 16 practice of misclassifying its drivers" and seeks the "recovery of civil penalties of not less than
 17 ten thousand dollars (\$10,000) and not more than twenty-five thousand dollars (\$25,000) for
 18 each violation." *Class Action Complaint*, ¶ 129. Between January 1, 2012 and August 2, 2012,
 19 Exel has contracted with 158 California-Based Independent Contractors. *Albarano Decl.*, ¶ 5.
 20 The amount in controversy based on this claim alone is therefore **\$3,950,000** (158 California-
 21 Based Independent Contractors x \$25,000).

22 iii. *Meal and Rest Break Claims (Cal. Lab. Code § 512)*. Plaintiff alleges
 23 "Defendants knowingly and wrongfully refused to perform their obligation to provide" off-duty
 24 meal periods to him and class members. *Class Action Complaint*, ¶ 85. The 347 California-
 25 Based Independent Contractors worked a total of at least 20,000 weeks during the potential
 26 recovery period from June 14, 2008 to August 2, 2012. *Albarano Decl.*, ¶ 2. Consequently, the
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1 aggregate value of the meal break claim would be, at a minimum, **\$800,000** (\$8.00 an hour for
 2 each meal period missed² x 5 missed meal periods per week³ x 20,000 weeks worked).

3 Plaintiff further asserts that “Defendants knowingly and willingly refused to perform
 4 their obligations to authorize and permit” he and other class members to take off-duty rest
 5 breaks. *Class Action Complaint*, ¶ 89. Consequently, the aggregate claim of Plaintiff’s rest
 6 break claim would be at least **\$800,000** (\$8.00 an hour for each rest period missed x 5 missed
 7 rest periods per week x 20,000 weeks worked).

8 c. Attorney Fees. Attorney fees may also be included in the amount in controversy if an
 9 underlying statute authorizes their award. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56
 10 (9th Cir. 1998) (attorney fees award may be included in the amount in controversy when an
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12 ² The \$8.00 an hour number is a significant reduction from the actual average hourly wage of the
 13 Plaintiff, who claims in the *Class Action Complaint* his experience is representative of the
 14 putative class. Plaintiff’s independent contractor file and IRS 1099 Forms indicate he contracted
 15 with Exel for 162 weeks between June 14, 2008 and August 2, 2012, and earned gross settlement
 16 amounts totaling \$315,419.83. *Albarano Decl.*, ¶ 4. The *Class Action Complaint* alleges Plaintiff
 17 worked “approximately 12-14 (12-14) hours a day” and had “to be available to make deliveries
 18 seven (7) days a week.” *Class Action Complaint*, ¶¶ 45, 48. These allegations suggest Plaintiff
 19 drove the maximum amount of hours allowed by the U.S. Department of Transportation
 20 regulations – 70 hours – every week. If Plaintiff did work the maximum of 70 hours each week,
 his average hourly wage while contracting with Exel would be **\$27.81** (\$315,419.80/162 weeks
 x 70 hours per week). Despite his average hourly wage being \$27.81, for purposes of this
 removal petition, Defendants calculated the hourly rate using the California minimum wage.
Behrazfar v. Unisys Corp., 687 F. Supp. 2d 999, 1004 (C.D. Cal. 2009) (noting that defendant is
 not required to “research, state, and prove the plaintiff’s claims for damages” and that a good
 faith conservative estimate is sufficient to support amount in controversy calculations).

21 ³ The Class Action Complaint does not define the frequency with which meal and rest breaks
 22 were missed other than to say “Defendants knowingly and willfully refused to perform their
 23 obligations to provide Plaintiff and Class members the off-duty” breaks they are entitled to under
 24 California law. *Class Action Complaint*, ¶¶ 85, 89. Based on the *Class Action Complaint*’s
 25 allegation that California-Based Independent Contractors were available seven days a week for
 26 deliveries and worked 12-14 hours per day, a conservative conclusion is at least 5 meal breaks
 and 5 rest breaks were purportedly missed each week by each class member. *See Ray v. Wells*
Fargo Bank, NA, CV 11-01477 AHM (JCx), 2011 WL 1790123, at *7 (C.D. Cal. May 9, 2011)
 (finding conservative estimate of overtime in calculating amount in controversy was sufficient
 for removal purposes where plaintiff’s complaint made vague assertion that “consistent”
 overtime was performed).

1 underlying statute authorizes their award). Plaintiff seeks reasonable attorneys' fees in this case.
 2 *Class Action Complaint*, ¶¶ 76, 80, 85, 89, 97, 101, 105, 109, 112, 115, 119, 123. In class action
 3 cases in California, prevailing plaintiffs have requested, and courts have awarded, attorneys' fees
 4 of approximately 25% of the overall recovery. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
 5 1047 (9th Cir. 2002) (28%); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301,
 6 1311 (9th Cir. 1990) (25%); *Paul, Johnson, Alston & Hunt v. Grauity*, 886 F.2d 268, 272 (9th
 7 Cir. 1989) (25%). Consistent with the cited cases, Plaintiff's counsel has requested similar
 8 attorney fee awards in other wage and hour lawsuits. *See Hammock v. Oracle Corp.*, No. 06-
 9 2846-SBA (N.D. Cal. Mar. 17, 2009) (approving request for attorney fee award of 25% of
 10 amount recovered as part of FLSA collective action and Rule 23 class action settlement); *Gomez*
 11 *v. Perot Sys. Corp.*, No. CV-08-03337-SC (N.D. Cal. Jan. 7, 2011) (approving request for
 12 attorney fee award of 25% of amount recovered as part of a Rule 23 class action settlement
 13 involving alleged California Labor Code violations). It is therefore anticipated that Plaintiff's
 14 attorneys will seek, at a minimum, 25% of any amounts they recover as awardable attorneys'
 15 fees. Thus, if Plaintiff is awarded the \$8,695,882 amount in controversy in this case based on the
 16 Third, Fourth, Eighth, and Twelfth Causes of Action alone, Plaintiff's attorneys are expected to
 17 seek at least \$2,173,970 in attorneys' fees. When this figure is added to the \$8,695,882 Plaintiff
 18 seeks in connection with his Third, Fourth, Eighth, and Twelfth Causes of Action, the total
 19 amount in controversy is at least **\$10,869,852**.

20 When the putative value of Plaintiff's nine additional causes of action and the putative
 21 value of Plaintiff's attorney fee claims are considered, there can be no question that the
 22 jurisdictional threshold is met here.

23 6. Class Action. This case is a class action within the meaning of 28 U.S.C.
 24 §§ 1332(d)(2) and 1453. Those statutes provide that a class action is a civil action filed either
 25 under Fed. R. Civ. P. 23 or a similar state statute or rule that authorizes one or more
 26 representative persons to maintain a class action. *Id.* In this case, Plaintiff filed his *Class Action*

Complaint in a California state court and accordingly seek certification under Cal. Code of Civ. P. § 382, which authorizes representative actions. And as noted above, there are more than 100 persons falling within the class definition set out at ¶ 70 of the *Class Action Complaint*.

7. **Timeliness of Removal.** Pursuant to 28 U.S.C. § 1446(b), a defendant must file its notice of removal within 30 days of receiving a copy of the complaint. Exel and DHL were served a copy of the *Class Action Complaint* on July 5, 2012; Deutsche Post has not been served. Thirty-days from July 5, 2012 is Saturday, August 4, 2012. Defendants' notice of removal is accordingly due to be filed by Monday, August 6, 2012. *See Fed.R. Civ. P. 6(a); Williams v. Leonard*, No. C02-05084 CRB, 2003 WL 163183, at *1 (N.D. Cal. 2003). Defendants' notice of removal is therefore timely filed on this date, August 6, 2012. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999).

8. **Notice of Removal to Adverse Parties and to State Court Clerk.** Pursuant to 28 U.S.C. § 1446(d), Defendants will give written notice of the removal to Plaintiff and to the Clerk of the Superior Court of Alameda County, California. Specifically, promptly after filing this Notice of Removal, Defendants shall send a Notice of Removal to Adverse Parties and State Court Clerk, a true and correct copy of which is attached hereto as *Exhibit C*.

9. **No Waiver.** By filing this Notice of Removal, Defendants do not waive any defenses available to it.

WHEREFORE, Defendants respectfully remove this case to this Court.

Dated: August 6, 2012

Respectfully submitted,

Christopher C. McNatt, Jr.,

Attorney for Defendants

Exhibit "A"

FAXED

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FILED
ALAMEDA COUNTY

JUN 14 2012

CLERK OF THE SUPERIOR COURT

Ashley

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9
IN AND FOR THE COUNTY OF ALAMEDA

10
11 DANIEL VILLALPANDO, individually
12 and on behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 EXEL DIRECT INC., DEUTSCHE POST
16 DHL, DHL EXPRESS (USA), Inc., and
17 DOES 1 to 50,

18 Defendants.

19 Case No.: _____
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COMPLEX CASE; CLASS ACTION

- 21 1) Failure To Pay Minimum Wage &
22 Liquidated Damages (Labor Code §§
1182.11, 1182.12, 1194, 1197, and 1197.1;
IWC Wage Order No. 9; and Minimum
Wage Order);
- 23 2) Failure To Pay Overtime (Labor Code
§§ 510 and 1194 *et seq.*, and IWC Wage
Order No. 9);
- 24 3) Failure To Provide Off-Duty Meal
Periods (Labor Code §§ 226.7 and 512;
and Cal.Code Regs., Title 8 § 11090
sections 7 & 11);
- 25 4) Failure To Provide Off-Duty Rest
Periods (Labor Code §§ 226.7 and C.C.R.,
Title 8 § 11090 section 12);
- 26 5) Unlawful Deductions From Wages
(Labor Code §§ 221, 223, and 400-410;
IWC Wage Order No. 9; and Title 8
C.C.R. § 11090 section 8);
- 27 6) Cost Of Physical Examinations
(Labor Code § 222.5);
- 28 7) Coerced Purchases (Labor Code § 450
et seq.);
- 8) Reimbursement Of Business Expenses
(Labor Code § 2802);
- 9) Failure To Keep Accurate Payroll
Records (Labor Code §§ 1174 & 1174.5);
- 10) Failure To Furnish Accurate Wage

Daniel Villalpando, et al. v. Exel Direct Inc., Deutsche Post DHL, et al.
COMPLAINT

1 Statements (Labor Code § 226);
2 11) Waiting Time Penalties (Labor Code
3 §§ 201-203);
4 12) Willful Misclassification Of
5 Individual As Independent Contractor
6 (Labor Code § 226.8); and
7 13) Unfair Competition (Bus. & Prof.
8 Code §§ 17200, et seq.).
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I. INTRODUCTION

1. Plaintiff Daniel Villalpando (hereinafter "Plaintiff") brings this class action on behalf of
himself and all other similarly situated Drivers currently and formerly employed by Defendants
within the State of California against Defendants Exel Direct Inc. (hereinafter "Exel Direct"),
Deutsche Post DHL (hereinafter "DHL"), DHL Express, Inc., (hereinafter "DHL Express"), and
Does 1-50 (hereinafter collectively referred to as "Defendants"). Throughout the relevant time
period of this action, which began four years prior to the filing of the present Complaint,
Defendants have routinely violated the following the California Labor Code and California Code of
Regulations, by improperly categorizing Class Members, including Plaintiff, as independent
contractors when they are, in fact, employees.

11 2. Plaintiff, on his own behalf and on behalf of all Class Members, brings this action pursuant to
12 Labor Code §§ 201-203, 221, 222.5, 223, 226.8, 226.3, 226.7, 400-410, 450, 510, 512, 1182, 1174,
13 1194, 1197, 1197.1, and 2802; California Code of Regulations, Title 8 § 11090 section 7 & 11-12;
14 California Wage Order No. 1-2001 (8 Cal. Code Reg., § 11090); and Industrial Wage Commission
15 Wage (hereinafter "IWC") Order No. 9. Specifically, Plaintiff challenges Defendants' policies of:
16 (1) classifying Drivers as independent contractors instead of employees; (2) failing to reimburse
17 Plaintiff and the Class for reasonable business expenses; (3) making deductions from Plaintiff's and
18 the Class' wages; (4) requiring Plaintiff and the Class to pay for pre-employment medical and
19 physical examinations; (5) coercing or compelling Plaintiff and the Class to purchase things of
20 value from Defendants; (6) failing to provide, authorize, permit and/or make available bona fide
21 meal and rest periods to Plaintiff and the Class as required by California law; (7) denying Plaintiff
22 and the Class full compensation for all hours worked; (8) failing to pay Plaintiff and the Class
23 minimum wage; (9) failing to pay Plaintiff and the Class overtime and double time; (10) failing to
24 provide Plaintiff and the Class with accurate, itemized wage statements; (11) failing to timely pay
25 Plaintiff and the Class full wages upon termination or resignation; and (12) engaging in a pattern or
26 practice of willfully misclassifying employees as independent contractors.

27 3. Plaintiff seeks full compensation, on behalf of himself and all others similarly situated, of all
28 damages, penalties and interest owed for unpaid minimum wages, payment of all wages earned,

1 denial of meal and rest periods, reimbursement of all illegal deductions made from their wages,
2 failure to furnish accurate and itemized wage statements, and waiting-time penalties, and
3 reimbursement of expenses and losses incurred by them in discharging their duties, and civil
4 penalties.

5 4. Plaintiff, on behalf of himself and all others similarly situated, also requests reasonable
6 attorneys' fees and costs pursuant to, inter alia, Labor Code §§ 225.5, 226, 226.7, 558, 1194, 1197,
7 and 2802; and Code of Civil Procedure § 1021.5.

8 5. Plaintiff, on behalf of himself and all others similarly situated, also brings this action pursuant
9 to Business & Professions Code §§ 17200-17208, seeking injunctive relief and restitution due to
10 Defendants' unlawful violation of the Labor Code.

11

12 II. VENUE AND JURISDICTION

13 6. The Court has jurisdiction over this class action pursuant to Article 6, § 10 of the California
14 Constitution and California Code of Civil Procedure § 410.10.

15 7. Additionally, this Court has jurisdiction over Plaintiff's and the Class' claims for injunctive
16 relief, including restitution of earned wages, arising from Defendants' unfair competition under
17 Business & Professions Code §§ 17203 and 17204. The Court also has jurisdiction over Plaintiff's
18 and the Class' claims for penalties in violation of the Labor Code pursuant to Business and
19 Professions Code § 17202, as well as pursuant to the applicable Labor Code provisions.

20 The Court has jurisdiction over Defendants because they are corporations authorized to do business
21 in the State of California and are registered with the California Secretary of State. Defendants do
22 sufficient business with sufficient minimum contacts in California, and/or otherwise intentionally
23 avail themselves of the California market through the advertising, marketing and sale of goods and
24 services, to render the exercise of jurisdiction over Defendants by the California court consistent
25 with traditional notions of fair play and substantial justice.

26 8. Venue is proper in this judicial district pursuant to Code of Civil Procedure § 395.5.
27 Defendants employ Class members and transact business in Alameda County.

28

SCHNEIDER WALLACE
COTTRELL BRAYTON
KONECKY w

Daniel Villalpando, et al. v. Exel Direct Inc., Deutsche Post DHL, et al.
COMPLAINT

III. PARTIES

A. Plaintiff

9. Plaintiff and all putative Class members as set forth below are current or former Drivers of Defendants who are or were employed as "independent contractors" by Defendants in California at some time during the period beginning four years prior to the filing of the original Complaint in this action to the present.

10. Plaintiff Daniel Villalpando is a resident of Oakley, California in Contra Costa County. Plaintiff worked as a Driver at Defendants' office located in the Sears' warehouse in California between approximately September 2008 and December 2011.

11. Mr. Villalpando was employed by Defendants as a Driver and he has held this same job position since he began working for Defendants in September 2008. Mr. Villalpando's agreement was terminated by Exel Direct in December of 2011.

B. Defendants

12. Plaintiff is informed, believes and alleges that, at all times mentioned herein, Defendants Exel Direct Inc. is and was engaged in the business of delivery services in the State of California. Exel Direct is a wholly owned entity of Deutsche Post DHL and is part of the Supply Chain division of Deutsche Post DHL. Deutsche Post DHL owns and operates under a number of different names and/or entities, which are headquartered in Ohio, including, but not limited to, DHL Express (USA), (collectively referred to as "Exel Direct").

13. Exel Direct Inc. and DHL Express (USA), Inc. both have a registered agent at 818 W. Seventh Street, Los Angeles, California 90017.

14. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as DOES 1 through 50, inclusive, are currently unknown to Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure § 474. Plaintiff is informed, believes, and based thereon alleges, that each of the Defendants designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein and for Plaintiff's

1 and the Class' damages as herein alleged. Plaintiff will amend this Complaint and/or seek leave of
2 court to amend this Complaint to reflect the true names and capacities of the Defendants designated
3 hereinafter as DOES when such identities become known to her.

4 15. Defendants are or were the joint employers of Plaintiff and the class of employees he seeks to
5 represent. Plaintiff is informed and believes that each and every of the acts and omissions alleged
6 herein were performed by, and/or attributable to, all Defendants, each acting as agents and/or
7 employees, and/or under the direction and control of each of the other Defendants, and that said acts
8 and failures to act were within the course and scope of said agency, employment and/or direction
9 and control.

10 16. Plaintiff is informed and believes that each of the Defendants is liable to Plaintiff and the
11 Class as an "employer," as that term is defined in Section 18 of the Labor Code, Wage Order 9,
12 section 2(F) and Wage Order 14-2001, section 2(F). As employers of Plaintiff and the Class
13 throughout the relevant time period, Defendants, and each of them, are either solely or jointly and
14 severally liable for back pay and other economic damages, including statutory penalties, owed to
15 Plaintiff and the Class under common law and by statute.

16

17 **IV. FACTUAL ALLEGATIONS**

18 17. During the relevant time period of this action, Defendants have employed Plaintiff and other
19 similarly situated individuals to provide delivery services (hereinafter "Drivers").

20 18. Prior to commencing work for Exel Direct, the Defendants required all prospective Drivers to
21 fill out an application, which requested information such as their employment history, driver's
22 license, driving records from the DMV and MVR, credit check scores, background and criminal
23 check, and personal references.

24 19. Exel Direct required prospective Drivers to undergo a physical examination and to submit to
25 drug and alcohol testing prior to employment. Drivers must agree to continue to submit to drug and
26 alcohol testing whenever requested by Exel Direct throughout their employment. Drivers were
27 required to pay for the costs of such examinations and tests, which Exel Direct would deduct from
28 the Drivers' paychecks.

1 20. Exel Direct required Drivers to obtain a business licenses showing that they were a LLC or
2 Corporation. Exel Direct would assist the Drivers in the process by assisting them in the completion
3 of the paperwork and/or loan the Drivers the money necessary to obtain a business license, which
4 was later deducted out of Drivers' paychecks weekly.

5 21. Exel Direct required the applicants to sign an "Independent Truckman's Agreement"
6 (hereinafter "Agreement") with no ability to negotiate the terms, but rather as a condition of
7 employment.

8 22. The Agreement was drafted exclusively by Exel Direct and/or its legal counsel.

9 23. The Agreement purports to classify Drivers as independent contractors so as to conceal the
10 true nature of the relationship between Exel Direct and its Drivers, i.e., that of employer and
11 employees. The Agreement was only in English. Plaintiff requested an Agreement in Spanish but
12 was told Exel did not have one.

13 24. Although the Agreement stated that it would be in effect for a period of one (1) year, it
14 simultaneously stated that it would remain in effect from year-to-year unless either party terminated
15 it.

16 25. Exel Direct required that Drivers provide sixty (60) days written notice prior to terminating
17 their employment with Exel Direct with or without cause. If Exel Direct terminated the Agreement
18 without cause, it had the right, at its option, to transfer the driver to another location. If the Driver
19 did not comply with the transfer, it constituted a breach of the agreement and Exel Direct could
20 terminate the agreement without notice. Exel Direct additionally retained the right to terminate
21 Drivers without notice if they failed adhere to any part of the agreement.

22 26. Exel Direct required each Driver to execute an Equipment Lease Agreement (hereinafter the
23 "Lease"). Under the Lease, the Driver agreed to provide Exel Direct with a delivery vehicle
24 (hereinafter the "Vehicle").

25 27. The Drivers must purchase or lease the Vehicles from a third party or through Exel Direct
26 from Enterprise. If a Driver leased a Vehicle through Exel Direct, then Exel Direct deducted the
27 leasing costs from the Drivers' paychecks.

28

SCHNEIDER-WALLACE
COTTERELL-BRAYTON
KONECKY,LLP

Daniel Villalpando, et al. v. Exel Direct Inc., Deutsche Post.DHL, et al.
COMPLAINT

1 28. All Vehicles used by Drivers must conform to a specific criteria set forth by Exel Direct,
2 which included the type and color of Vehicle.

3 29. Exel Direct required Drivers' Vehicles to be marked with several Exel Direct and large Sears
4 decals on the sides and front of the Vehicle to identify it as being part of Sears and Exel Direct.

5 30. Exel Direct required control and exclusive use of any equipment, including the Vehicles used
6 throughout their employment. Drivers are told that they are unable to use their Vehicles to provide
7 any other type of delivery services.

8 31. Exel Direct furnished the Drivers with additional equipment necessary to deliver the
9 appliances, such as straps, hand trucks, pallet jacks and blankets. Drivers were unable to deny the
10 additional equipment, and told that if they did deny it, then their agreement would be terminated.

11 32. Exel Direct required Drivers to attend training for a minimum of two weeks conducted by
12 Exel Direct. The training discussed how to drive the Vehicle, what speed to drive the Vehicle, what
13 subjects to discuss with the Customer, exactly what to say to the Customer, how to install each
14 appliance, and how to load and unload the appliances. Additional training was also required when a
15 new appliance would arrive. Exel Direct did not compensate the Drivers in anyway while they
16 attended training.

17 33. Exel Direct required the Drivers and their assistants to speak only English while performing
18 deliveries at the customer's home.

19 34. Exel Direct controlled the amount that Drivers paid their assistants. Exel Direct required
20 Drivers to pay their assistants a minimum of one hundred dollars (\$100) a day.

21 35. Approximately twice a week, Exel Direct conducted routine on-site evaluations of Drivers. A
22 manager or an assistant manager would perform a surprise visit at one of the delivery locations of
23 the Drivers and closely evaluated the Driver while he performed his delivery and installation of the
24 appliance(s).

25 36. Exel Direct prohibited its Drivers from wearing a uniform with their business name on it.
26 Instead, Exel Direct required the Drivers to wear uniforms that it selected.

27 37. The Drivers' uniform shirt is only available for purchase through Exel Direct. The cost of the
28 uniforms is deducted from the Drivers' weekly pay.

1 38. Exel Direct required its Drivers to adhere to strict requirements regarding the Drivers' and
2 their assistants' appearances. Exel Direct required Drivers to wear a uniform, their shirt to be
3 buttoned and tucked in, have groomed hair, be clean shaven, and have no visible tattoos or piercings.

4 39. Exel Direct exercised its power to set eligibility requirements for Drivers' assistants. All
5 assistants must undergo criminal background checks; may not be convicted of certain crimes that
6 involve violence, dishonesty or drug use; and may not use illegal drugs.

7 40. Exel Direct trained Drivers on how to interact with customers. Exel Direct required Drivers to
8 follow a certain dialogue when greeting the customers and at the end of the delivery service, to make
9 eye contact, and not to shake a female customer's hand.

10 41. Exel Direct had strict protocols on how Drivers were to interact with Customers. For example,
11 Exel Direct did not permit Drivers to use the restroom at the customer's house, accept any type of
12 food, water or any gratuity, despite Customers offering such things.

13 42. Drivers were rated by Exel Direct based on customers' reviews. Exel Direct's ratings of the
14 Drivers determined what route the Drivers would receive. If a Driver received a low score and did
15 not improve it within two weeks, the Driver would be terminated.

16 43. Exel Direct required its Drivers to report to Exel Direct's office at the warehouse at 6:00 a.m.
17 each workday. At 6:30 a.m., Exel Direct required the Drivers to attend a meeting with Exel Direct
18 for approximately thirty minutes to discuss topics related to customer service and Drivers'
19 performance. After, the Drivers would load the appliances into their Vehicles until approximately
20 8:00 a.m. or 8:30 a.m.

21 44. Exel Direct required its Drivers to return their delivery logs and all old appliances from the
22 Customers to the warehouse after completing all of their deliveries. The warehouse closed at 5:30
23 p.m., but Drivers were generally unable to complete their deliveries before. As a result, Drivers were
24 required to return the next morning even if they were not scheduled to work.

25 45. On average, the Driver's daily delivery route consisted of 20 (20) individual delivery
26 locations. Drivers worked approximately twelve to fourteen (12-14) hours a day to complete such
27 assigned routes.

28

1 46. Drivers were prohibited from using the Vehicles to offer delivery services independent from
2 the delivery services that they were required to provide for Exel Direct.

3 47. Drivers were prohibited from using the Vehicles offer any non-Exel Direct delivery services.

4 48. Exel Direct required Drivers to be available to make deliveries seven (7) days a week. Exel
5 Direct retained the right to order Drivers to work holidays and days after holidays (such as the
6 Friday after Thanksgiving). Failure to work such days resulted in a deduction, suspension and/or
7 termination of the Driver by Exel Direct.

8 49. Drivers were required to ask Exel Direct for permission to take days off, however Exel Direct
9 routinely denied Drivers' requests. If Drivers took a day off without permission from Exel Direct,
10 then the Drivers were subject to termination of their agreement without cause.

11 50. Exel Direct assigned the delivery routes to the Drivers, which they were required to complete.
12 If the Driver did not complete or refused to accept the assigned delivery route, Exel Direct would
13 deduct the cost of another driver to perform the delivery route from the Driver's paycheck. As stated
14 in Exhibit D of the Agreement, Drivers "will be responsible for any expense(s) incurred by the
15 Company in performing or having other parties perform the general duties for the Contractor when
16 he/she is unable or unwilling to perform the general duties prescribed in Section 1 of the
17 Independent Truckman's Agreement." Section 1 of the Agreement requires Drivers to deliver
18 consumer items and other related services necessary to serve Exel Direct's customers when
19 requested by Exel Direct.

20 51. Exel Direct assumed complete authority over what home deliveries each Driver serviced. Exel
21 Direct assigned Drivers to a specific home delivery route. The Drivers were not permitted to
22 exchange assignment among them.

23 52. Exel Direct exercised total control over the workload of the Drivers, including how many
24 deliveries each Driver made and when the deliveries were made each day. Drivers were given a two
25 hour delivery window to deliver the appliances, which was scheduled by Exel. If the Drivers did not
26 complete each delivery during the specified time window, Drivers were subject to a deduction
27 and/or termination of their agreement.

28

1 53. Drivers were not permitted to allow persons who were already pre-approved by Exel Direct to
 2 assume their job duties, even temporarily.

3 54. Drivers were continuously evaluated regarding their adherence to Exel Direct's standards
 4 regarding when pick-ups and deliveries are made, whether they were on time for deliveries, how
 5 many deliveries and when were to be made, whether they called in any anticipated delays to
 6 dispatch, whether they called each customer thirty (30) minutes prior to delivery, and whether they
 7 honored special time requests.

8 55. Exel Direct controlled when and how the Drivers' Vehicles were maintained. Exel Direct
 9 routinely checked the Vehicles' condition. Exel Direct inspected and controlled what maintenance
 10 needed to be done to the Vehicle and deducted the cost of the maintenance from the Driver's weekly
 11 paychecks. This included oil changes, new tires, and car washes.

12 56. Drivers were required to adhere to Exel Direct standards regarding the upkeep of their
 13 Vehicle, such as whether all equipment was clean and in good condition, the cab was organized and
 14 clean, the truck bed was clean and whether decals were in good condition. Exel Direct performed
 15 daily inspections to ensure that these requirements were met.

16 57. Exel Direct required its Drivers to follow specific instructions as to how to load and unload,
 17 and transport the appliances. Drivers were trained and evaluated by Exel Direct regarding their
 18 adherence to Exel Direct approved delivery techniques, such as the speed limits they must drive,
 19 which is lower than the legal requirements; how to strap and unstrap the appliances in the Vehicle;
 20 how to carry the appliances; how to complete their "trip sheets;" and how to and what equipment
 21 could be used to carry the appliance inside the customer's house.

22 58. Exel Direct required its Drivers to complete a daily log, which is a "trip sheet," of each
 23 delivery that they made each day and obtain each customer's signature on the log. Drivers were
 24 instructed as to precisely how to complete the log. The drivers were required to return the log to
 25 Exel Direct at the end of each business day.

26 59. Exel Direct required its Drivers to call Exel Direct using the Driver's cellular telephone
 27 throughout the day for the following purposes, but not limited to: notifying customers thirty (30)
 28 minutes prior to arriving at the customer's location; report their arrival and departure times; and to

1 report whether the Driver was going to be delayed or unable to make the delivery at the scheduled
 2 time. If the Drivers did not follow any of these delivery procedures, they were subject to a
 3 deduction or termination.

4 60. Drivers were not reimbursed for the cellular telephones despite it being a business expense of
 5 Exel Direct.

6 61. Exel Direct required each Driver to "purchase" certain items, which were properly
 7 Defendants' business expenses, such as maintenance fees, drug and alcohol tests, background and
 8 criminal checks, DMV and MVR records, service apparel and cleaning, vehicle washes, physical
 9 examinations, and delivery supplies. All of these "purchases" were from Exel Direct itself, and Exel
 10 Direct deducted an amount for each of these items from each Driver's gross pay. The Drivers could
 11 not negotiate the amounts that were deducted for each of Exel Direct's business expenses. Thus,
 12 Exel Direct created a façade that Drivers were paying for their own tools and equipment used in the
 13 course of their supposed independent business, but in reality Exel Direct improperly forced Drivers
 14 to pay for Exel Direct's own business expenses.

15 62. Drivers were required by Exel Direct to obtain specific types and levels of insurance. The
 16 Drivers could purchase insurance through a third party, which had to meet Exel Direct's
 17 requirements; or through the Company's insurer, which Exel Direct deducted a weekly amount from
 18 their paychecks for insurance. If the Driver purchased insurance through Exel Direct, Exel Direct
 19 would complete the paper work for the Driver and all documents returned by the Insurance
 20 Company regarding the policy were received and kept by Exel Direct and not by the Driver.
 Furthermore, if Drivers obtained insurance through the Exel Direct's obtained insurance program,
 Exel Direct would charge an administration fee that was equal to ten percent (10%) of the total
 insurance cost, which was deducted from the Drivers' paychecks.

21 63. Exel Direct required Drivers to list Exel Direct to be named as an additional insured on all
 22 liability coverage.

23 64. Exel Direct required its Drivers to give and maintain a fifteen hundred dollar (\$1,500) bond
 24 with Exel Direct. If Drivers were unable to pay the bond at the beginning of their employment, Exel
 25 Direct would deduct a certain amount from Drivers' weekly paychecks to supplement the bond.

1 65. Drivers were compensated on a highly structured system that gave them no opportunity to
2 exercise entrepreneurship or otherwise engage in the risks and rewards associated with owning a
3 business. Accordingly, Drivers were paid either a flat weekly rate or a set commission, as
4 determined by Exel Direct, with no opportunity to negotiate individually for a higher rate or
5 commission. Plaintiff was told that the flat rate paid per a delivery was the equivalent of the
6 commission amount.

7 66. Exel Direct decided which method of payment would be utilized. Drivers were not able to
8 choose the method of payment. The amount of the weekly payment or commission was not
9 negotiable, nor was the amount of various chargebacks that Exel Direct deducts from the Driver's
10 weekly paychecks.

11 67. The Driver's weekly paychecks are deposited by direct deposit into their bank accounts.
12 Alternatively, if a Driver preferred to receive payment by check, that Driver was charged a fifteen
13 dollar (\$15) administration fee for each check, which Exel Direct deducted from the Driver's weekly
14 paycheck.

15 68. Plaintiff is informed and believes and thereon alleges that, through common policies and
16 practices collectively and individually, have systematically engaged in a fraud designed to make its
17 Drivers appear to be running independent businesses, when in reality its Drivers are Exel Direct's
18 employees.

9 69. Defendants' unlawful conduct has been widespread, repeated, and willful throughout
10 California. Defendants knew or should have known that their policies and practices have been
11 unlawful and unfair.

V. CLASS ALLEGATIONS

23 70. *Proposed Class Definition.* Plaintiff brings this case as a class action on behalf of himself and
24 all others similarly situated pursuant to Code of Civil Procedure § 382. The Class that Plaintiff
25 seeks to represent are composed of and defined as follows:

26 (a) This Class is defined as: "All current and former Drivers who were required to sign the
27 "Independent Truckman's Agreement" and provided delivery services for Exel Direct in
28 the State of California during the period June 2008 through the present.

1 71. *Community of Interest.* This action has been brought and may properly be maintained as a
 2 class action under Code of Civil Procedure § 382 because the proposed Class is easily ascertainable
 3 and there is a well-defined community interest in the litigation:

- 4 a) *Numerosity:* The potential members of the Class as defined are so numerous that joinder of
 5 all the members of the Class is impracticable. While the precise number of Class members
 6 has not been determined at this time, Plaintiff is informed and believes that Defendants have
 7 employed over 250 persons to work as Independent Drivers. Joinder of all members of the
 8 Class is therefore impracticable.
- 9 b) *Common Questions of Law and/or Fact:* There are questions of law and fact common to
 10 Plaintiff and the Class that predominate over any questions affecting only individual
 11 members of the Class. These common questions of fact include, without limitations:
- 12 i. Whether all Class members are properly categorized as independent contractors and
 13 not as employees.
- 14 ii. Whether Defendants exercises control, directly or indirectly, over Class Members'
 15 work hours.
- 16 iii. Whether Defendants exercises control, directly or indirectly, over Class Members'
 17 working conditions.
- 18 iv. Whether Class members are entitled to compensatory damages for violations of the
 19 Labor Code as set forth herein.
- 20 v. Whether the Class members who have terminated their employment relationship
 21 with Defendants are entitled to penalty wages for Exel Direct's failure to timely pay
 22 all outstanding amounts of compensation owed upon termination of the employment
 23 relationship.
- 24 vi. Whether the Class members are entitled to compensation for the coerced purchases.
- 25 vii. Whether the Class members are entitled to be reimbursed for Defendants' business
 26 expenses and deductions.
- 27 viii. Whether the Class members are entitled to attorneys' fees and litigation costs for
 28 violations of the Labor Code as set forth herein.

- iii. Each proposed Class member has suffered injury and is entitled to recover by reason of Defendants' illegal policies and/or practices as alleged herein.
 - iv. Class action treatment will allow those similarly situated persons to litigate their claims in the manner that is most efficient and economical for the parties and the judicial system.
 - v. The prosecution of separate actions against Defendants by individual proposed Class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants.
 - vi. An important public interest will be served by addressing the present wage and hour suit as a class action. ("The prompt payment of wages due [to] an employee is a fundamental policy of this state." *Belaire-West Landscaping Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 562, *citing Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571.)

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Failure to Pay Minimum Wages
California Labor Code §§ 1182.11, 1182.12, 1194, 1197, and 1197.1;
IWC Wage Order No. 9; and Minimum Wage Order
(Against All Defendants and Does 1-50)

0 72. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 71 above as
1 though fully set forth herein.

2 73. During the applicable statutory period, California Labor Code §§ 1182.11, 1182.12 and 1197,
3 and the Minimum Wage Order were in full force and effect and required that Defendants' California
4 Drivers receive the minimum wage for all hours worked irrespective of whether nominally paid on a
5 piece rate, or any other bases, at the rate of eight dollars (\$8.00) per hour commencing January 1,
6 2008.

7 74. Defendants have maintained a consistent policy of failing to pay minimum wages to Plaintiff
8 and Class members, as required by law, including the work time being engaged to wait or be at

1 Defendants' facilities or at Defendants' direction and time spent attending required meetings or
2 training.

3 75. By failing to maintain adequate time records as required by California Labor Code § 1174(d)
4 and IWC wage order No. 9, § 7(A), Defendants have made it difficult to calculate the minimum
5 wage compensation due to Plaintiff Villalpando and all other similarly situated Drivers.

6 76. As a direct and proximate result of the unlawful acts and/or omissions of Defendants, Plaintiff
7 and Class members have been deprived of minimum wages in an amount to be determined at trial,
8 and are entitled to recover of such amount, plus liquidated damages, plus interest thereon, and
9 attorneys' fees and costs pursuant to Labor Code §§ 1194, 1194.2 and 1197.1.

10

11

SECOND CAUSE OF ACTION

Failure to Pay Overtime Compensation

California Labor Code §§ 510 and 1194 *et seq.*, and IWC Wage Order No. 9.
(Against All Defendants and Does 1-50)

12

13

14 77. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 76 above a
15 though fully set forth herein.

16 78. By Defendants' failure to pay overtime compensation to Plaintiff and Class members,
17 Defendants violated California Labor Code § 510 and IWC wage order No. 9, § 3, which require
18 overtime compensation to non-exempt employees.

19 79. By failing to maintain adequate time records as required by California Labor Code § 1174(d)
20 and IWC wage order No. 9, § 7(A), Defendants have made it difficult to calculate the compensation
21 of overtime owed to Plaintiff Villalpando and all other similarly Drivers.

22 80. As a direct and proximate result of the unlawful acts and/or omissions of Defendants, Plaintiff
23 and Class members have been deprived of overtime compensation in an amount to be determined at
24 trial, and are entitled to recover of such amount, plus interest thereon, and attorneys' fees and costs
25 pursuant to California Labor Code §§ 554, 1194, 1194.2 and 1197.1.

26

27

28

THIRD CAUSE OF ACTION

**Failure to Provide Proper Meal Breaks, or Compensation in Lieu Thereof
California Labor Code §§ 226.7 and 512; and Cal. Code Regs., Title 8 § 11090 sections 7 & 11
(Against All Defendants and Does 1-50)**

4 81. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 80 above as
5 though fully set forth herein.

6 82. California Labor Code §§ 226.7 and 512, and Title 8 of the California Code of Regulations §
7 11090, section 11 require Defendants to provide meal periods to Plaintiff and members of the
8 proposed Class. California Labor Code §§ 226.7 and 512, and Title 8 of the California Code of
9 Regulations § 11090, section 11 prohibit employers from employing an employee for more than
10 five hours without a meal period no less than 30 minutes and for more than ten hours without a
11 second meal period. Unless the employee is relieved of all duty during the thirty-minute meal
12 period, the employee is considered "on duty" and the meal or rest period is counted as time worked.

13 83. Under both California Labor Code § 226.7(b) and Title 8 of the California Code of
14 Regulations § 11090, section 11, an employer who fails to provide a required meal period must, as
15 compensation, pay the employee one hour of pay at the employee's regular rate of compensation for
16 each workday that the meal period was not provided.

17 84. Title 8 of the California Code of Regulations § 11090, section 7 requires the Defendants to
18 keep time records of meal periods in order to satisfy the requirements of California's meal period
19 laws and regulations.

20 85. Despite these requirements, Defendants knowingly and willfully refused to perform their
21 obligations to provide Plaintiff and Class members the off-duty meal period. Defendants also failed
22 to pay Plaintiff and Class members one hour of pay for each off-duty meal period that they have
23 been denied. Defendants' conduct described herein violates California Labor Code §§ 226.7 and
24 512 and Title 8 of the California Code of Regulations § 11090. Therefore, Plaintiff and members of
25 the putative Class are entitled to compensation for Defendants' failure to provide, authorize and
26 permit and/or make available meal periods, plus interest, attorneys' fees, expenses, and costs of suit
27 pursuant to California Labor Code §§ 226.7(b) and Title 8 of the California Code of Regulations §
28 11090.

FOURTH CAUSE OF ACTION

**Failure to Provide Proper Rest Breaks, or Compensation in Lieu Thereof
California Labor Code §§ 226.7 and Cal. Code Regs., Title 8 § 11090 section 12
(Against All Defendants and Does 1-50)**

86. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 85 above as though fully set forth herein.

87. California Labor Code § 226.7 and Title 8 of the California Code of Regulations § 11090, section 12 requires Defendants to provide rest periods to Plaintiff and members of the proposed Class. Both California Labor Code § 226.7 and Title 8 of the California Code of Regulations § 1190, section 12 prohibit employers from employing an employee for more than four hours without ten minutes of net rest time and to pay employees their full wages during those rest periods. Unless the employee is relieved of all duty ten-minute rest periods, the employee is considered "on duty" and the rest period is counted as time worked.

88. Under both California Labor Code § 226.7 and Title 8 of the California Code of Regulations § 1190, section 12 an employer must pay an employee who was denied a required rest period one hour of pay at the employee's regular rate of compensation for each workday that the rest period was not provided.

89. Despite these requirements, Defendants knowingly and willfully refused to perform their obligations to authorize and permit to Plaintiff and Class members the off-duty rest periods who regularly worked in excess of four. Defendants also failed to pay Plaintiff and Class members one hour of pay for each rest period that they have been denied. Defendants' conduct described herein violates California Labor Code §§ 226.7 and Title 8 of the California Code of Regulations § 11090. Therefore, Plaintiff and members of the putative Class are entitled to compensation for Defendants' failure to provide, authorize and permit and/or make available rest periods, plus interest, attorneys' fees, expenses, and costs of suit pursuant to California Labor Code §§ 226.7(b) and 1194, and Title 8 of the California Code of Regulations § 11090.

FIFTH CAUSE OF ACTION

Unlawful Deductions from Wages

**California Labor Code §§ 221, 223, and 400-410; IWC Wage Order No. 9; and
Title 8 C.C.R. § 11090 section 8.
(Against All Defendants and Does 1-50)**

Against All Defendants and Does 1-50)

90. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 89 above as though fully set forth herein.

6 91. California Labor Code § 221 states "It shall be unlawful for any employer to collect or receive
7 from an employee any part of wages thereto paid by said employer to said employee." Labor Code
8 § 223 states, "[w]here any statute or contract requires an employer to maintain the designated wage
9 scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated
10 by statute or by contract."

11 92. California Labor Code §§ 400-410 ("Employee Bond Law") provide limited circumstances in
12 which an employer can exact a cash bond from its employees. These provisions are designed to
13 protect employees against the very real danger of an employer taking or misappropriating employee
14 funds held by the employer in trust.

15 93. IWC wage order No. 9, § 8 and Title 8 of the California Code of Regulations § 11090, section
16 8 provides that the only circumstances under which an employer can make a deduction from an
17 employee's wage due to cash shortage, breakage, or loss of equipment if the employer can show the
18 shortage, breakage, or loss was the result of the employee's gross negligence or dishonest or willful
19 act.

20 94. These statutes as well as California's fundamental public policy protecting wages and wage
21 scales, prohibit employers from subjecting employees to unanticipated or unpredicted reductions in
22 their wages; making employees the insurers of their employer's business losses; otherwise passing
23 the ordinary business losses of the employee; taking deductions from wages for business losses
24 unless the employer can establish that the loss was caused by a dishonest or willful act, or gross
25 negligence of the employee; or taking other unpredictable deductions that may impose a special
26 hardship on employees.

27 95. Defendants violated California Labor Code §§ 221, 223, and 400-410, and IWC wage order
28 No. 9, §8 by unlawfully taking deductions from Plaintiff and Class members' compensation to

1 cover certain ordinary business expenses of Defendants, including but not limited to claims for loss
2 or damaged cargo, property damage claims and bodily injury claims, "merchandise claims" granted
3 to customers, costs of delivery services of a route if the Driver was not willing to perform that
4 requested route and fees charged associated with obtaining insurance through the Exel Direct's
5 insurance program. Said deductions were made by Defendants as part of a deliberate subterfuge
6 that has been designed, constructed, implemented and administered to circumvent the clear
7 prohibitions of California case law and Title 8 of the California Code of Regulations § 11090.

8 96. Because Defendants took unlawful deductions from Drivers' compensation they are liable to
9 Plaintiff and Class members for the compensation that should have been paid for but for the
10 unlawful deductions under California Labor Code § 221, 223 and 400-410, IWC Wage Order No. 9,
11 and Title 8 of the California Code of Regulations § 11090.

12 97. As a result of Defendants' unlawful deduction from wages and not paying the Plaintiff and
13 Class members, Defendants is liable for penalties, reasonable attorneys' fees, and costs.

14

15 **SIXTH CAUSE OF ACTION**
16 **Cost of Physical Examinations**
17 **California Labor Code § 222.5**
18 **(Against All Defendants and Does 1-50)**

19 98. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 97 above as
20 though fully set forth herein.

21 99. California Labor Code § 222.5 prohibits any person from withholding or deducting from the
22 compensation of any employee, or require any prospective employee or applicant for employment
23 to pay, any fee for, or cost of any pre-employment medical or physical examination taken as a
24 condition of employment.

25 100. Defendants violated Labor Code § 222.5 by requiring Plaintiff and Class members to pay for
26 drug and alcohol tests and physical examinations as a condition of their employment.

27 101. Therefore, in accordance with California Labor Code § 222.5, Plaintiff and members of the
28 putative Class are entitled to reimbursement, compensation for penalties, attorneys' fees, expenses,
and costs of suit.

SEVENTH CAUSE OF ACTION

Coerced Purchases

California Labor Code § 450 *et seq.*
(Against All Defendants and Does 1-50)

102. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 101 above as though fully set forth herein.

103. Labor Code § 450 prohibits an employer or agent, or other person to compel or coerce any applicant for employment or employee to purchase anything of value, including any fee of any type to apply for employment; to receive or complete an application for employment; or for an employer to provide, accept or process an application for employment.

104. Defendants violated Labor Code § 450 by compelling and/or coercing Plaintiff and Class
members to patronize Defendants by requiring Plaintiff and Class members to lease or purchase
moving equipment, delivery supplies, uniforms, cellular phones and other items directly from
Defendants and/or other companies.

14 105. Therefore, in accordance with California Labor Code § 450, Plaintiff and members of the
15 putative Class are entitled to reimbursement, compensation for penalties, attorneys' fees, expenses,
16 and costs of suit.

EIGHTH CAUSE OF ACTION

Reimbursement of Business Expenses

California Labor Code § 2802

(Against All Defendants and Does 1-50)

106. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 105 above as though fully set forth herein.

107. California Labor Code § 2802, section (a) provides that an employee shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee to direct the consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.

1 108. During the applicable statutory period, Plaintiff and the Class members incurred necessary
 2 expenditures and losses in direct consequence of the discharge of their employment duties and their
 3 obedience to the directions of Defendants, including but not limited to:

- 4 (a) Plaintiff and Class members have necessarily incurred expenditures for truck
 5 rentals/leases, towing, gasoline, tires, maintenance, repairs, car washes, and insurance in
 6 connection with their operation of the Vehicles used to perform home delivery services for
 7 Defendants. Plaintiff is informed and believes that Defendants reimbursed none of these
 8 expenditures or losses to Plaintiff and Class members.
- 9 (b) Plaintiff and Class members have necessarily incurred expenditures in connection with
 10 physical examinations, drug and alcohol tests, background and criminal checks, and DMV
 11 and MVR records of Drivers, which were performed by Exel Direct as a condition of
 12 employment. Plaintiff is informed and believes that Defendants reimbursed none of these
 13 expenditures or losses to Plaintiff and Class members.
- 14 (c) Plaintiff and Class members have necessarily incurred expenditures in connection with
 15 delivery supplies required by Exel Direct in order for the Drivers to perform home
 16 delivery services. Plaintiff is informed and believes that Defendants reimbursed none of
 17 these expenditures or losses to Plaintiff and Class members.
- 18 (d) Plaintiff and Class members have necessarily incurred expenditures in connection with
 19 cell phones used to communicate with Defendants and Sears customers in order to
 20 perform home delivery services for Defendants. Plaintiff is informed and believes that
 21 Defendants reimbursed none of these expenditures or losses to Plaintiff and Class
 22 members.
- 23 (e) Plaintiff and the Class members have been required to purchase and contribute to
 24 automobile insurance and occupational accident insurance to cover accidental injury to
 25 them during the course and scope of their employment with Defendants, which constitutes
 26 workers' compensation insurance. Said deductions have violated California Labor Code §
 27 3751(a). Plaintiff is informed and believes that Defendants reimbursed none of these
 28 expenditures or losses to Plaintiff and Class members.

1 109. Plaintiff is informed and believes that pursuant to California Labor Code § 2802(a) Plaintiff
2 and Class members are entitled to recover their unreimbursed expenditures and losses, interest
3 thereon and attorney's fees and costs, in amount to be proven at trial under California Labor Code §
4 2802(b)-(c).

5

6 **NINTH CAUSE OF ACTION**

7 **Failure to Keep Accurate Payroll Records**
California Labor Code §§ 1174 & 1174.5
(Against All Defendants and Does 1-50)

8
9 110. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 109 above as
10 though fully set forth herein.

11 111. California Labor Code § 1174 requires Defendants to maintain payroll records showing the
12 actual hours worked daily by Plaintiff and Class members.

13 112. Defendants knowingly, intentionally, and willfully failed to maintain payroll records showing
14 the actual hours worked by Plaintiff and Class members as required by California Labor Code §
15 1174 and in violation of §1174.5. As a direct result of Defendants' failure to maintain payroll
16 records, Plaintiff and Class members have suffered actual economic harm as they have been
17 precluded from accurately monitoring the numbers of hours worked and thus seeking all accrued
18 minimum wage and overtime pay. As a direct and proximate result of the unlawful acts and/or
19 omissions of Defendants, Plaintiff and Class members are entitled to recover damages in an amount
20 to be determined at trial and civil penalties, plus interest thereon, and attorneys' fees and costs
21 pursuant to Labor Code.

22

23 **TENTH CAUSE OF ACTION**

24 **Failure to Furnish Accurate Wage Statements**
California Labor Code § 226
(Against All Defendants and Does 1-50)

25
26 113. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 112 above as
27 though fully set forth herein.

28

1 114. California Labor Code § 226(a) requires employers to furnish each employee with a statement
2 itemizing, *inter alia*, the total hours worked and wages earned by the employee semi-monthly or at
3 the time of each payment of wages. California Labor Code § 226(e) provides that if an employer
4 knowingly and intentionally fails to provide a statement itemizing, *inter alia*, the total hours worked
5 by the employee, then the employee is entitled to recover the greater of all actual damages or fifty
6 dollars (\$50) for the initial violation and one hundred dollars (\$100) for each subsequent violation,
7 up to a maximum of four thousand dollars (\$4,000).

8 115. Defendants knowingly, intentionally, and willfully failed to furnish Plaintiff and Class
9 members with timely, accurate, itemized statements showing the actual total hours worked and the
10 wages earned, as required by California Labor Code § 226(a). As a result, Defendants is liable to
11 Plaintiff and proposed Class members for the amounts, penalties, court costs and attorneys' fees
12 provided by California Labor Code § 226(e).

13 116. Plaintiff, on behalf of himself and the proposed Class, requests an assessment of penalties as
14 stated herein and other relief as described below.

15

16 **ELEVENTH CAUSE OF ACTION**
17 Waiting Time Penalties
18 California Labor Code §§ 201-203
(Against All Defendants and Does 1-50)

19 117. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 116 above as
20 though fully set forth herein.

21 118. California Labor Code § 201 requires an employer who discharges an employee to pay all
22 compensation due and owing to said employee immediately upon discharge. California Labor
23 Code § 202 requires an employer to promptly pay compensation due and owing to said employee
24 within seventy-two (72) hours of that employee's termination of employment by resignation.
25 California Labor Code § 203 provides that if an employer willfully fails to pay compensation
26 promptly upon discharge or resignation, as required under California Labor Code §§ 201 and 202,
27 then the employer is liable for waiting time penalties in the form of continued compensation for up
28 to thirty (30) work days.

1 119. Plaintiff and members of the putative Class have left their employment with Defendants
2 during the statutory period. Defendants willfully have failed and refused, and continue to willfully
3 fail and refuse, to timely pay minimum wages, overtime compensation and sums wrongfully
4 deducted from compensation to Plaintiff and to all other proposed Class members whose
5 employment with Defendants have ended or been terminated at any point during the statutory
6 period, as required by California Labor Code §§ 201-202. As a result, Defendants is liable to
7 Plaintiff and other formerly employed members of the proposed Class for waiting time penalties,
8 together with interest thereon and attorneys' fees and costs, under California Labor Code § 203.
9 Plaintiff, on behalf of himself and the proposed Class, requests waiting time penalties pursuant to
10 California Labor Code § 203 and as described below.

11

12 **TWELTH CAUSE OF ACTION**
13 **Willful Misclassification of Individual as Independent Contractor**
14 **California Labor Code § 226.8**
15 **(Against All Defendants and Does 1-50)**

16 120. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 119 above as
17 though fully set forth herein.

18 121. Defendants intentionally and willfully characterized Plaintiff and Class members as
19 independent contractors rather than employees in violation of Labor Code § 226.8.

20 122. Defendants engaged in a pattern and practice of misclassifying employees as independent
21 contractors for their own financial benefit.

22 123. As a direct and proximate result of the unlawful acts and/or omissions of Defendants, Plaintiff
23 and Class members are entitled to recover damages in an amount to be determined at trial and civil
24 penalties, plus interest thereon, and attorneys' fees and costs pursuant to Labor Code § 226.8.

25 124. Plaintiff is informed and believes that Exel has engaged in or is engaging in a pattern or
26 practice of misclassifying its Drivers, and Plaintiff seeks recovery of civil penalties of not less than
27 ten thousand dollars (\$10,000) and not more than twenty-five thousand dollars (\$25,000) for each
28 violation, in addition to any other penalties or fines permitted by law.

THIRTEENTH CAUSE OF ACTION
Unfair Competition and Unlawful Business Practices
California Business and Professions Code §§ 17200, *et seq.*
(Against All Defendants and Does 1-50)

4 125. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 123 above as
5 though fully set forth herein.

6 126. California Business and Professions Code § 17200 defines unfair competition to include
7 "unlawful, unfair or fraudulent business practices."

8 127. Moreover, Business and Professions Code § 17203 provides that the Court may restore to an
9 aggrieved party any money or property acquired by means of unlawful and unfair business
10 practices. Plaintiff seeks a court order requiring an audit and accounting of the payroll records to
11 determine the amount of restitution of all unpaid wages owed to himself and members of the
12 proposed Class, according to proof, as well as a determination of the amount of funds to be paid to
13 current and former employees that can be identified and located pursuant to a court order and
14 supervision.

15 128. Plaintiff and all proposed Class members are "persons" within the meaning of Business and
16 Professions Code § 17204 who have suffered injury in fact as a result of Defendants' unfair
17 competition, and who comply with the requirements of California Code of Civil Procedure Section
18 382, as set forth above and, therefore, have standing to bring this claim for injunctive relief,
19 restitution, and other appropriate equitable relief.

20 129. Defendants' have committed acts of unfair competition as defined by the Unfair Competition
21 Law, by engaging in the unlawful, unfair and fraudulent business practices and acts described in
22 this Complaint, but not limited to:

23 (a) violations of California Labor Code §§ 1182.11 and 1182.12
24 (b) violations of California Labor Code § 1194
25 (c) violations of California Labor Code §§ 1197 and 1197.1
26 (d) violations of California Labor Code § 510
27 (e) violations of California Labor Code §§ 226.7 and 512
28 (f) violations of California Code Regulations, Title 8 § 11090 sections 7 & 11

- (g) violations of California Code Regulations, Title 8 § 11090 section 12
- (h) violations of California Labor Code §§ 221, 223 and 400-410
- (i) violations of IWC Wage Order No. 9
- (j) violations of California Labor Code § 222.5
- (k) violations of California Labor Code § 450, *et seq.*
- (l) violation of California Labor Code § 2802
- (m) violations of California Labor Code §§ 1174 and 1174.5
- (n) violations of California Labor Code §226
- (o) violations of California Labor Code §§ 201-203
- (p) violations of California Labor Code §226.8

1 130. Plaintiff reserves the right to identify additional unfair and unlawful practices by Defendants
2 as further investigation and discovery warrants.

3 131. As a result of its unlawful and/or unfair acts, Defendants have reaped and continue
4 to reap unfair benefits and illegal profits at the expense of Plaintiff and proposed Class members.
5 Defendants' unlawful and/or unfair conduct has also enabled Defendants to gain an unfair
6 competitive advantage over law-abiding employers and competitors. Defendants should be
7 enjoined from this activity and made to restore to Plaintiff and proposed Class members their
8 wrongfully withheld wages, interest thereon, and related statutory penalties, pursuant to Business
9 and Professions Code §§ 17202 and 17203.

0 132. Plaintiff, on behalf of himself and the proposed Class, requests restitution of unpaid wages,
1 wage premiums, injunctive relief and other relief as described below.

VII. PRAYER FOR RELIEF

4 WHEREFORE, Plaintiff, on behalf of himself and the proposed Class he seeks to represent in this
5 action, requests the following relief:

6 That the Court determine that this action may be maintained as a class action under Code of
7 Civil Procedure § 382;

a) That the Court find that Defendants have violated applicable provisions of the California

1 Labor Code by failing to pay each member of the proposed Classes for all hours worked,
2 including minimum wage;

3 b) That the Court find that Defendants have violated applicable provisions of the California
4 Labor Code §§ 510, 1194 *et seq.*, and IWC Wage Order No. 9 by failing to pay overtime
5 wages to Plaintiff and members of the Class;

6 c) That the Court find that Defendants have violated California Labor Code §§ 226.7 and 512
7 by failing to provide Plaintiff and members of the Class with meal and therefore owe penalties
8 under California Labor Code § 226.7(b) with respect to violations of California Code of
9 Regulations, Title 8 § 11090, sections 7 and 11;

0 d) That the Court find that Defendants have violated California Labor Code §§ 226.7 by failing
1 to provide Plaintiff and members of the Class with rest breaks, and therefore owe penalties
2 under California Labor Code § 226.7(b) with respect to violations of California Code of
3 Regulations, Title 8 § 11090, section 12;

4 e) That the Court find that Defendants have violated California Labor Code §§ 221, 223 and
5 400-410, and IWC Wage Order No. 9 by making unlawful deductions from Plaintiff's and the
6 Class' wages;

7 f) That the Court find that Defendants have violated California Labor Code § 222.5 by
8 requiring Drivers to pay for physical examinations, and drug and alcohol tests as to Plaintiff
9 and the Class;

0 g) That the Court find that Defendants have violated California Labor Code § 450, *et seq.* by
1 compelling and/or coercing Drivers to purchase things of value as to Plaintiff and the Class;
2 That the Court find that Defendants have violated California Labor Code § 2802, by failing to
3 reimburse the Plaintiff and the Class reasonable business expenses and losses;

4 h) That the Court find that Defendants have violated the recordkeeping provisions of California
5 Labor Code §§ 1174 and 1174.5 as to Plaintiff and the Class;

6 i) That the Court find that Defendants have violated California Labor Code § 226 by failing to
7 timely furnish Plaintiff and members of the Class with itemized statements accurately showing
8 the total hours worked, vacation benefits, bonus benefits, and wages earned by each of them

1 during each pay period;

6 k) That the Court find that Defendants have violated California Labor Code § 226.8 and
7 therefore owe civil penalties under California Labor Code § 226.8 and all damages proximately
8 caused by Defendants' wrongful conduct of engaging in a pattern or practice of willfully
9 misclassifying delivery drivers as independent contractors;

10 1) That the Court find that Defendants have committed unfair and unlawful business practices, in
11 violation of California Business and Professions Code § 17200, *et seq.*, by their violations of
12 the Labor Code and Wage Orders as described above;

16 n) That the Court find that Defendants' violations of the California Labor Code described
17 herein have been willful;

18 o) That the Court award to Plaintiff and the Class restitution for the coerced purchases and
19 costs of the physical and medical examinations incurred by Drivers, including interest thereon,
20 liquidated damages and/or statutory penalties and other statutory penalties in amounts subject to
21 proof at trial;

22 p) That the Court award to Plaintiff and the Class restitution for the reasonable business
23 expenses and deductions incurred by Drivers, including interest thereon, liquidated damages
24 and/or statutory penalties and other statutory penalties in amounts subject to proof at trial;

25 q) That the Court award to Plaintiff and the Class restitution for the amounts of unpaid wages,
26 including interest thereon, liquidated damages and/or statutory penalties for failure to timely
27 furnish accurate itemized wage statements, and waiting time and other statutory penalties in
28 amounts subject to proof at trial;

- 1 r) That Defendants be ordered and enjoined to pay restitution and penalties to Plaintiff and the
2 Class due to Defendants' unlawful and/or unfair activities, pursuant to Business and Professions
3 Code §§ 17200-17205;

4 s) That Defendants further be enjoined to cease and desist from unlawful and/or unfair
5 activities in violation of Business and Professions Code § 17200, pursuant to § 17203;

6 t) That Plaintiff and the Class be awarded reasonable attorneys' fees and costs pursuant to
7 Labor Code §§ 203, 225.5, 226, 1194, 1197, and 2804, Code of Civil Procedure § 1021.5,
8 and/or other applicable law;

9 u) That the Court award such other and further relief as this Court may deem just, equitable,
10 and proper; and

11 v) These Defendants be ordered to refrain from retaliating against any Class members who are
12 current employees.

Dated: June 13, 2012

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL BRAYTON
KONECKY LLP

By:

Attorney for Plaintiff and the Proposed Class

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on all claims and issues for which Plaintiff and the Class are entitled to a jury.

Dated: June 13, 2012

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL BRAYTON
KONECKY LLP

By:

CLINT J. BRAYTON
Attorneys for Plaintiffs

SCHNEIDER WALLACE
COTTRELL BRAYTON
KONECKY & CO.

10371883

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Todd M. Schneider (SBN 158253) Clint J. Brayton (SBN 192214) Schneider Wallace Cottrell Brayton Konecky LLP 180 Montgomery Street, Suite 2000 San Francisco, CA 94104 TELEPHONE NO.: (415) 421-7100 FAX NO.: (415) 421-7105 ATTORNEY FOR (Name): Plaintiff		FOR COURT USE ONLY FILED ALAMEDA COUNTY JUN 14 2012 CLERK OF THE SUPERIOR COURT <i>John</i>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: 1225 Fallon Street CITY AND ZIP CODE: Oakland 94612 BRANCH NAME: Rene C. Davidson		
CASE NAME: Villaipando, et al. v. Exel Direct Inc., et al.		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited <input type="checkbox"/> Limited (Amount demanded exceeds \$25,000) (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	CASE NUMBER: RG12634666 JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case: Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (44) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (18) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input checked="" type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (08) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. Large number of separately represented parties d. Large number of witnesses
 b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
 c. Substantial amount of documentary evidence f. Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify):

5. This case is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: June 13, 2012

Clint J. Brayton

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

(TYPE OR PRINT NAME)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

Schneider & Wallace
Attn: Brayton, Clint J.
180 Montgomery Street
Suite 2000
San Francisco, CA 94104-4207

Excel Direct Inc

**Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse**

Villalpando	Plaintiff/Petitioner(s)	No. <u>RG12634666</u>
vs.		
<u>Excel Direct Inc</u>	Defendant/Respondent(s) (Abbreviated Title)	

NOTICE OF HEARING

To each party or to the attorney(s) of record for each party herein:

Notice is hereby given that the above-entitled action has been set for:

Complex Determination Hearing
Case Management Conference

You are hereby notified to appear at the following Court location on the date and time noted below:

Complex Determination Hearing:
DATE: 07/30/2012 TIME: 03:00 PM DEPARTMENT: 17
LOCATION: Administration Building, Third Floor
1221 Oak Street, Oakland

Case Management Conference:
DATE: 09/04/2012 TIME: 03:00 PM DEPARTMENT: 17
LOCATION: Administration Building, Third Floor
1221 Oak Street, Oakland

Pursuant to California Rules of Court, Rule 3.400 et seq. and Local Rule 3.250 (Unified Rules of the Superior Court, County of Alameda), the above-entitled matter is set for a Complex Litigation Determination Hearing and Initial Complex Case Management Conference.

Department 17 issues tentative rulings on DomainWeb (www.alameda.courts.ca.gov/domainweb). For parties lacking access to DomainWeb, the tentative ruling must be obtained from the clerk at (510) 267-6933. Please consult Rule 3.30(c) of the Unified Rules of the Superior Court, County of Alameda, concerning the tentative ruling procedures for Department 17.

Counsel or party requesting complex litigation designation is ordered to serve a copy of this notice on all parties omitted from this notice or brought into the action after this notice was mailed.

All counsel of record and any unrepresented parties are ordered to attend this Initial Complex Case Management Conference unless otherwise notified by the Court.

Failure to appear, comply with local rules or provide a Case Management Conference statement may result in sanctions. Case Management Statements may be filed by E-Delivery, by emailing them to the following address:

EDelivery@alameda.courts.ca.gov. No fee is charged for this service. For further information,

go to Direct Calendar Departments at <http://apps.alameda.courts.ca.gov/domainweb>.

All motions in this matter to be heard prior to Complex Litigation Determination Hearing must be scheduled for hearing in Department 17.

If the information contained in this notice requires change or clarification, please contact the courtroom clerk for Department 17 by e-mail at Dept.17@alameda.courts.ca.gov or by phone at (510) 267-6933.

TELEPHONIC COURT APPEARANCES at Case Management Conferences may be available by contacting CourtCall, an independent vendor, at least 3 business days prior to the scheduled conference. Parties can make arrangements by calling (888) 882-6873, or faxing a service request form to (888) 883-2946. This service is subject to charges by the vendor.

Dated: 06/19/2012

Executive Officer / Clerk of the Superior Court

By



Digital

Deputy Clerk

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served this Notice by placing copies in envelopes addressed as shown hereon and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Executed on 06/19/2012.

By



Digital

Deputy Clerk

10552566

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Clint J. Brayton, 192214 SCHNEIDER WALLACE COTTRELL BRAYTON KONECKY LLP 180 Montgomery Suite 2000 San Francisco, CA 94104 TELEPHONE NO. (415) 421-7100 ATTORNEY FOR (Name): Plaintiff	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Superior Court of California, Alameda County 1225 Fallon Street, #209 Oakland, CA 94612-4293	FILED ALAMEDA COUNTY JUL 09 2012 CLERK OF THE SUPERIOR COURT By <i>Margaret Wilson</i> Deputy
PLAINTIFF/PETITIONER: Villapando	CASE NUMBER: RG12634668
DEFENDANT/RESPONDENT: Exel-Direct Inc., et al.	Ref. No. or File No.: 100848
PROOF OF SERVICE OF SUMMONS	

1. At the time of service I was a citizen of the United States, at least 18 years of age and not a party to this action.
 2. I served copies of: Complaint, Civil Case Cover Sheet, Notice of Hearing, Summons

BY FAX

3. a. Party served: Exel Direct Inc.
 b. Person Served: CT Corporation System, Margaret Wilson - Person authorized to accept service of process
 4. Address where the party was served: 818 West Seventh Street 2nd Floor
 Los Angeles, CA 90017
 5. I served the party
 a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): 7/5/2012 (2) at (time): 3:00 PM
 b. The "Notice to the Person Served" (on the summons) was completed as follows:
 c. on behalf of:

Exel Direct Inc.

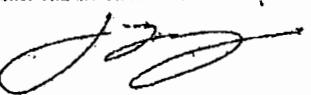
under: CCP 416.10 (corporation)

7. Person who served papers

a. Name: Jimmy Lizama
 b. Address: One Legal - 194-Marin
 504 Redwood Blvd #223
 Novato, CA 94947

- c. Telephone number: 415-491-0606
 d. The fee for service was: \$ 36.95 818 West Seventh Street 2nd Floor
 e. I am:
 (3) registered California process server.
 (I) Employee or independent contractor,
 (II) Registration No.: 4553
 (III) County: LOS ANGELES

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.
 Date: 7/6/2012



Jimmy Lizama
 (NAME OF PERSON WHO SERVED PAPERS)

(SIGNATURE)

Code of Civil Procedure, § 417.10

Form Adopted for Mandatory Use
 Judicial Council of California POS-010
 (Rev. Jan 1, 2007)

PROOF OF SERVICE OF SUMMONS

OL# 8783636

10552652

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Clint J. Brayton, 192214 SCHNEIDER WALLACE COTTRELL BRAYTON KONECKY LLP 180 Montgomery Suite 2000 San Francisco, CA 94104 TELEPHONE NO. (415) 421-7100 ATTORNEY FOR (Name): Plaintiff	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Superior Court of California, Alameda County 1225 Fallon Street, #209 Oakland, CA 94612-4293	FILED ALAMEDA COUNTY JUL 09 2012 CLERK OF THE SUPERIOR COURT By <i>Kimberly Shaffer</i> Deputy
PLAINTIFF/PETITIONER: Villalpando	CASE NUMBER: RG12634666
DEFENDANT/RESPONDENT: Exel Direct Inc., et al.	Ref. No. or File No.: 100849
PROOF OF SERVICE OF SUMMONS	

1. At the time of service I was a citizen of the United States, at least 18 years of age and not a party to this action.
 2. I served copies of: Complaint, Civil Case Cover Sheet, Notice of Hearing, Summons

BY FAX

3. a. Party served: DHL Express (USA), INC.
 b. Person Served: CT Corporation System, Margaret Wilson - Person authorized to accept service of process
 4. Address where the party was served: 818 West Seventh Street 2nd Floor
 Los Angeles, CA 90017
 5. I served the party
 a. by personal service, I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): 7/6/2012 (2) at (time): 3:00 PM
 6. The "Notice to the Person Served" (on the summons) was completed as follows:
 c. on behalf of:

DHL Express (USA), INC.

under: CCP 416.10 (corporation)

7. Person who served papers

a. Name: Jimmy Lizama
 b. Address: One Legal - 194-Marin
 504 Redwood Blvd #223
 Novato, CA 94947

c. Telephone number: 415-491-0606
 d. The fee for service was: \$ 35.96

e. I am:
 (3) registered California process server.
 (I) Employee or independent contractor.
 (II) Registration No.: 4553
 (III) County: LOS ANGELES

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.
 Date: 7/6/2012



Jimmy Lizama
 (NAME OF PERSON WHO SERVED PAPERS)

(SIGNATURE)

Code of Civil Procedure, § 417.10

Form Adopted for Mandatory Use
 Judicial Council of California POS-010
 (Rev. Jan 1, 2007)

PROOF OF SERVICE OF SUMMONS

OL# 6783637

10658862

FILED
ALAMEDA COUNTY

1 TODD M. SCHNEIDER, SBN 158253
2 CLINT J. BRAYTON, SBN 192214
3 SCHNEIDER WALLACE
4 COTTRELL, BRAYTON KONECKY LLP
5 180 Montgomery Street, Suite 2000
6 San Francisco, CA 94104
7 Telephone: (415) 421-7100
8 Facsimile: (415) 421-7105

JUL 19 2012

By Bruce Baker Ex. Off/Clerk

ORIGINAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

11 DANIEL VILLALPANDO, individually
12 and on behalf of all others similarly situated,
13 Plaintiff,
14 vs,
15 EXEL DIRECT INC., DEUTSCHE POST
16 DHL, DHL EXPRESS (USA), INC., and
DOES 1 to 50,
17 Defendants.

Case No.: RG 12634666

123
DECLARATION OF CLINT J.
BRAYTON IN SUPPORT OF
DETERMINATION THAT CASE IS
COMPLEX UNDER CRC 3.400

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SCHNEIDER WALLACE
COTTRELL, BRAYTON
KONECKY LLP

Daniel Villalpando, et al., v. Exel Direct Inc., Deutsche Post DHL, et al., RG 12634666
DECLARATION OF CLINT J. BRAYTON IN SUPPORT OF DETERMINATION THAT CASE IS COMPLEX
UNDER CRC 3.400

1 I, Clint J. Brayton, hereby declare as follows:

2 1. I am a partner of Schneider Wallace Cottrell Brayton Konecky LLP in San Francisco,
3 California, and counsel of record for Plaintiff in the above-referenced action. Each of the facts set
4 forth herein is true and correct within my personal knowledge, and if called and sworn as a witness,
5 I would competently testify thereto.

6 2. I have litigated numerous wage and hour class and collective actions in state and
7 federal court, including the Superior Court of California for the County of Alameda. Based on my
8 experience, I regard this case to be complex within the meaning of California Rule of Court
9 ("CRC") 3.400. I believe that it will benefit from a complex case determination and single
10 assignment, in terms of overall judicial efficiency and other case management issues.

11 3. Plaintiff's complaint alleges that Defendants EXEL DIRECT INC., DEUTSCHE
12 POST DHL, DHL EXPRESS (USA), INC. ("Defendants") misclassify delivery drivers as
13 "independent contractors" and as a result violates numerous sections of the California Labor Code.
14 This includes failing to pay its drivers overtime compensation for all of the overtime hours they work,
15 and failing to provide its drivers with the off-duty meal and rest periods to which they are entitled.
16 The complexity of this case arises from (1) the numerous Labor Code violations which Plaintiff
17 alleges as a result of Defendants' policy, and (2) the underlying legal questions which these claims
18 raise.

19 4. This case is a "complex case" as that term is defined by CRC 3.400(a), in that it will
20 require exceptional judicial management to avoid placing unnecessary burdens on the court and the
21 litigants to expedite the case, keep costs reasonable, and promote effective decision making.

22 5. This case will require several pre-trial motions, including, for example, motions for
23 class certification and summary judgment by Plaintiff. All of the anticipated motions in this action,
24 including discovery motions, motion for class certification, and motions for summary judgment, will
25 likely involve many of the same underlying set of facts and law.